No. 72-1318
and
No. 72-914

In the Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR KRAUSE, ADMINISTRATOR, *Petitioner*
v.
JAMES RHODES, et al., *Respondents*

ELAINE B. MILLER, ADMINISTRATRIX, *Petitioner*
v.
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SARAH SCHEUER, ADMINISTRATRIX, *Petitioner*
v.
JAMES RHODES, et al., *Respondents*

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS, ON BEHALF OF THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH, AND THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A., AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Council of the Churches of Christ in the U.S.A., The Union of American Hebrew Congregations, The Board of Church and Society of the United Methodist Church, and The

United Presbyterian Church in the U.S.A. hereby respectfully move for leave to file the attached brief *amicus curiae* in these cases. Oral consent of counsel for the Petitioners was obtained; but at the time of printing this motion written consent of the Respondents has not been secured, so that this motion for leave of court is necessary.

The National Council of the Churches of Christ in the U.S.A. is a national organization of religious groups which, among its other concerns, is devoted to the promotion of social justice and the advancement of due process of law. The issues at stake in the present review of these cases are of major importance to these concerns of the National Council of Churches, inasmuch as these issues are crucial to the legal enforcibility of constitutionally secured human rights. With specific reference to the incident giving rise to these present cases, the General Board of the National Council of Churches on September 11, 1971, adopted a resolution urging that the Plaintiffs-Petitioners in these cases, and others aggrieved by that incident, "continue to seek a remedy in the civil courts." The interest of the National Council of Churches is not in any way related to the prayer for monetary damages; rather, the interest of the National Council of Churches is in enabling the American system of justice to proceed to a fair determination of responsibility and accountability for the deaths and injuries that occurred in the historic and unforgettable tragedy out of which these cases arose. Furthermore, the particular issues of law raised at this stage of these proceedings are crucial to the enforcement of civil rights and liberties also in other contexts, and therefore invoke the Council's broadest concerns for social justice in the United States.

The Union of American Hebrew Congregations is the central congregational body of Reform Judaism. Its membership consists of approximately seven hundred Reform Synagogues, comprising approximately one million persons throughout the United States. By virtue of its programs of religious action and social action, the Union of American Hebrew Congregations is dedicated to the application of religious ideals to the social problems of American life. The Union is concerned that the process of justice proceed fairly to an accounting for the

tragic event giving rise to these cases. In addition, the Union is concerned for the indispensable requisites of enforcibility of civil rights and civil liberties, which are decisively tested by the issues in these cases.

The United Methodist Church is a religious body with approximately ten million five hundred thousand members in the United States. The Board of Church and Society is its national agency with responsibility for social witness to the Christian Gospel on a wide range of issues. Through its Department of Law, Justice and Community Relations, the Board of Church and Society of the United Methodist Church has been deeply involved in seeking justice in the wake of the shootings at Kent State University on May 4, 1970. Pursuant to this active and long-standing concern for establishing an accountability for the killing of four young people and the wounding of nine others on that day, the Board of Church and Society wishes to join as *amicus curiae* in these cases.

The United Presbyterian Church in the U.S.A. is a religious body with approximately three million members in the United States. Sharing, as a part of its religious conviction and Christian message, the concern for justice and the enforcibility of legally protected human rights that has been articulated by the other *amici* herein, the United Presbyterian Church in the U.S.A. wishes to join in this brief.

Thus, representing the collective social conscience of several millions of religious Americans, these *amici* move the Court for leave to file the attached brief *amicus curiae*, supporting the position of Petitioners in these cases. It is the hope of *amici* that this unusual chorus of religious voices will emphasize the profound moral and constitutional significance of the issues presented for decision here.

Respectfully submitted,

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August, 1973

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STATEMENT OF INTEREST OF AMICI CURIAE

The interests of the several *amici* in this litigation are set forth in the Motion for Leave to File, bound together with this brief, at page i *supra*.

The arguments of *amici* in this brief support the position of Petitioners in the three cases: Arthur Krause, Elaine B. Miller, and Sarah Scheuer.

SUMMARY OF ARGUMENT

Because of the remarkable behavior of the courts below in disregarding the allegations of the unanswered complaints, postulating factual premises of their own contrivance, and charging the plaintiffs' lawyers with deliberate attempts at deception, justice in this review proceeding requires a careful review of what is judicially noticeable concerning the events giving rise to these complaints. Part I of this brief is an orderly recapitulation of such judicially noticeable facts as reported in official government documents.

Because the causes of action stated in plaintiffs' complaints depend in part upon important propositions of constitutional law which have sometimes been the subject of confusion and disagreement, it is necessary to clarify and document these propositions in order for the character of plaintiffs' claims to be fully understood. Part II of this brief explains how the complaints invoke these constitutional propositions, and documents the propositions by reference to numerous cases and other authorities.

Only in the context of the factual and constitutional setting thus disclosed can the specific issues framed by the certiorari petitions be perceived in their full and profound significance. Part III of this brief examines those issues and argues that: (A) The courts below improperly assumed facts contrary to the unanswered complaints; (B) In holding the eleventh amendment a bar to these actions the courts below flew in the face of consistent and vigorous contrary rulings by this Court; (C) In creating an absolute personal privilege or immunity for unconstitutional acts of executive officials the Court of Appeals departed from precedent and destroyed an indispensable safeguard of constitutional rights; (D) The Courts below improperly ignored the diversity claims of plaintiffs Krause and Miller; and (E) The United States is not a necessary party in this litigation.

ARGUMENT

I. FACTUAL CONTEXT OF THE ISSUES

These cases were dismissed by the District Court before any answer had been filed. There has been no trial of the facts. Ordinarily a reviewing court would therefore judge the facts, at this stage, from the allegations of the complaints. In these cases, however, both the District Court and the Court of Appeals went beyond the complaints, relying upon their own recollection of hearsay reports and purported judicial notice to support their postulation of facts contrary to the allegations of the complaints. The propriety or impropriety of their doing so is discussed later in this brief; but the fact that they did so makes it both appropriate and necessary for this Court, in reviewing the decisions, to have as full a picture of the facts which are truly cognizable by judicial notice as is possible. The majority opinion in the Court of Appeals postulates an "insurrection" at Kent State University on May 4, 1970, and also postulates that plaintiffs' decedents were killed "during" a "riot" at Kent. Judge O'Sullivan, concurring, charges plaintiffs' attorneys with "dissembling," and asserts that the pleadings "were clearly contrived to hide rather than disclose the true background of the involved events." These factual postulations and charges so color the decisions being reviewed that this Court cannot perform its own task of review without taking fully into account what is now public knowledge about the Kent State event.

The circumstances giving rise to the present cases were the subject of exhaustive investigation by an official Commission authorized by the Congress and appointed by the President of the United States. The Report of that Commission, the President's Commission on Campus Unrest, which was transmitted to the President on September 26, 1970, is a proper subject of judicial notice. 8 *Cyc. Fed. Pro.* §26.222. The Commission's factual conclusions may not control in the face of competent evidence at a trial; but where, as here, complaints have been dismissed before answer, the Commission's findings are a better source of factual premises than anything relied upon by the courts below. Pages 233-290 of the *Report of the*

President's Commission on Campus Unrest, supplemented by 120 pages of photographs, constitute the Commission's Special Report on Kent State. The account which follows is a condensation of the Commission's Special Report, emphasizing salient points.

Northeastern Ohio late in April, 1970, was beset with wildcat trucker strikes. To deal with striker violence, the Governor (defendant Rhodes), on April 29 issued a proclamation calling out the National Guard. That proclamation mentioned seven counties of the state by name but Portage County, the location of Kent, was *not* one of those specified. Several things are notable about that April 29 proclamation. Although the preamble recited that sheriffs and police had proved "unable with their own forces to bring about a cessation of violence," and that "the Mayors of many Ohio cities . . . have urgently requested" National Guard aid, these findings had to do with the truck strike disturbances, not with any prior or anticipated campus unrest. Furthermore, while the military forces were to "act in aid of the civil authorities," the import of this was merely that the military commanders should "consult with [the civilian authorities] to the extent necessary to determine the objects to be accomplished." Notwithstanding the rule of the cases in Ohio and elsewhere, including this Court, as will be detailed in the next section of this brief, the proclamation specifically provided that "the procedure of execution" was to be left to "the discretion of the commanding military officer designated by the Adjutant General." No control over the discretion of the military officers was reserved by the proclamation even to the Governor himself; the Adjutant General was left free to designate whatever and however many units he chose, and in his own discretion "to take action necessary for the restoration of order throughout the State of Ohio." (When a few days later the language, "throughout the State," was given application to localities as to which no formal gubernatorial finding of civilian incapacity had been made, the tremendous scope of this abdication of civilian authority into military hands would become clear.)

While the Ohio National Guard was on duty for the truckers' strikes, the President's war policy in Southeast Asia took a

dramatic new turn. On the night of April 30, the President announced that he had ordered United States troops into Cambodia. The daylight hours of May 1 at Kent State were marked only by some peaceful protest assemblies; but that evening a series of incidents more or less related to unhappiness over the new turn in war policy produced about $10,000 in property damage to about 15 business buildings in downtown Kent, some minor property damage on the University campus, two police injuries from rocks or other missiles, and 15 arrests. During the night, at the request of the Mayor of Kent, a National Guard liaison officer was sent to survey the situation in Kent; but no military troops were authorized or sent.

On May 2, among several other steps taken to prevent a recurrence of violence and disorder, an injunction was procured against damage or destruction of buildings or other property. There was no injunction, however, against assemblies or rallies, a fact that was specifically pointed out in leaflets distributed on the University campus by University officials. Late in the afternoon of May 2, in the face of rumored new violence, the Mayor of Kent telephoned the Governor's office with a request for National Guard assistance. The jurisdiction of the Mayor of the City of Kent over the campus of Kent State University was dubious at best. City police in Kent regarded the campus as outside their jurisdiction, and subject to the University's campus police. The University officials privy to the Mayor's request for the National Guard were under the impression that the Guard was being requested for duty only in the city of Kent and not on the Kent State campus. No University official ever requested National Guard assistance, on that day or on any other.

Considering the language of his April 29 proclamation, "throughout the State of Ohio," to be adequate to cover the Kent situation, the Governor verbally authorized the commitment of guardsmen to the City of Kent without any written proclamation. (A *post facto* proclamation covering Kent and the Kent State University campus was issued three days later, on May 5, after the Guard had been present there for more than two days and after the shootings giving rise to this litigation had already occurred.) Guardsmen bivouaced at

Akron, ten miles from Kent, were placed on standby. In the evening on May 2, a crowd growing to about 1,000 persons gathered on the campus, and after a short while moved toward the ROTC building. No effort was made by the campus police or any other civilian forces to prevent persons in the crowd from stoning or otherwise damaging the ROTC building. Even after the building had been set afire, no police were deployed until after firemen had arrived and been forced to withdraw. Only then did the campus police appear, using tear gas to drive the crowd away from the burning ROTC building. Meanwhile, a few minutes before the ROTC fire had been started, the Mayor of Kent (but no University official) had secured the dispatch of the alerted National Guardsmen into the City of Kent.

Upon arriving in Kent and conferring with the Mayor, but without consulting with or requesting or receiving permission from any University official, the Adjutant General of Ohio (defendant Del Corso) sent National Guard troops onto the campus. By midnight, without benefit of any request or instructions from University officials, the National Guard had cleared the campus with tear gas, and held it secure.

On the morning of May 3 the Governor arrived in the City of Kent, and held a news conference in which he vehemently denounced campus violence and pledged to "eradicate the problem." After two hours the Governor left the city, having done nothing to resolve the uncertainties about applicable rules and relative authority that still had the various civilian officials and peace forces confused. The University officials, in particular, (including defendant White) surmised that their authority had been preempted, and abdicated to the National Guard. That evening, at about 9 p.m., the National Guard dispersed a crowd from the Campus Commons, and after two hours of ensuing non-violent demonstrations, a half-hour of rock throwing, tear gas, minor injuries and arrests ended the day of May 3.

May 4 was a Monday. Classes were scheduled and held as usual. Both at the University and in the City of Kent, the ordinary functioning of institutions was unimpaired. The courts were open and operating, and city as well as University

officials performed their duties without interference. No buildings or public places were occupied or obstructed.

There still had not been any request or invitation from University officials for assistance or protection by the National Guard. The University President assumed his authority had been superseded, and he simply resigned himself to the Guard's control. As the morning advanced, plans for a noon rally were rumored around the campus. No civilian authority had forbidden such a rally, but the National Guard commander determined that it should be banned. By about 11:45 a.m., about 500 persons had gathered on the Campus Commons. No acts of violence had taken place. No speakers were inciting the crowd. No unlawful intent was apparent in the assembly.

Nevertheless the troop commander (defendant Canterbury) ordered that the crowd be dispersed.

The troops were ordered to "lock and load" their weapons thus chambering live ammunition ready to fire. A University policeman riding with riflemen in a National Guard jeep approached the crowd to convey the order to disperse, and some rock throwing and chanting began. A few hundred more students by now had joined the crowd, and the Guardsmen, fixing bayonets and firing tear gas, began to move them out. For the next thirty minutes, tear gas and epithets, and occasionally rocks, filled the air. One group of the guardsmen (consisting of Cavalry Troop G and some other units) drove a part of the crowd past the administration building and down a hill to a parking lot adjoining a football practice field. For about ten minutes the guardsmen remained on the practice field, separated from the parking lot by a high chain link fence. Rocks and tear gas cannisters were lobbed back and forth over the fence. At one point the members of Cavalry Troop G huddled in an apparent conference; at another point they knelt and aimed their rifles at the crowd. After about ten minutes on the practice field, the guardsmen were ordered by the Adjutant General to return up the hill. As they did so, the men of Troop G lagged and fell out of formation as they looked back over their shoulders at the dwindling parking lot crowd. At the crest of the hill, several members of Troop G

turned in unison approximately 135 degrees, retraced a few steps, and began to fire. Other guardsmen then turned and joined in the fusilade. The thirteen-second barrage of more than 60 shots was concentrated in the parking lot, more than 100 yards away.

In the Conclusion to its Special Report on Kent State, the President's Commission had this to say of the events which most proximately gave rise to the litigation now before this Court: "The May 4 rally began as a peaceful assembly on the Commons—the traditional site of student assemblies. Even if the Guard had authority to prohibit a peaceful gathering—a question that is at least debatable—the decision to disperse the noon rally was a serious error. The timing and manner of the dispersal were disastrous. Many students were legitimately in the area as they went to and from class. . . . The rally was peaceful, and there was no apparent impending violence. Only when the Guard attempted to disperse the rally did some students react violently." *Report of the President's Commission on Campus Unrest* 288 (1970). And with specific reference to the fusilade that caused the deaths of these plaintiffs' decedents, the Commission concluded: "The indiscriminate firing of rifles into a crowd of students and the deaths that followed were unnecessary, unwarranted, and inexcusable." *Id.* at 289.

In addition to the President's Commission on Campus Unrest, the FBI investigated the Kent State shootings, compiling some 8,000 pages of evidence. The FBI report was reviewed by a team of lawyers in the Department of Justice, who prepared a Summary of the FBI findings. A copy of that Justice Department Summary was given by Jerris Leonard, then head of the Civil Rights Division, to Senator Stephen Young of Ohio. Young secured the publication of the Summary (without Justice Department approval) as Chapter 4 of I. F. Stone's book, *The Killings at Kent State: How Murder Went Unpunished* (1971). The entire Justice Department Summary has since been published in the *Congressional Record*. 119 *Cong. Rec.*, E207 *et seq.* (daily ed., Jan. 15, 1973). This Justice Department Summary, as an official government document,

is also properly subject to judicial notice. 8 *Cyc. Fed. Pro.* § 26.222. Among the conclusions stated in the Justice Department Summary are the following:

> "Just prior to the time the Guard left its position on the practice field, members of Troop G [107th Armored Cavalry] were ordered to kneel and aim their weapons at the students in the parking lot south of Prentice Hall. They did so, but did not fire. One person, however, probably an officer, at this point did fire a pistol in the air . . .
>
> "The Guard was then ordered to regroup and move back up the hill past Taylor Hall."
>
> . . .
>
> "The crowd on top of the hill parted as the Guard advanced and allowed it to pass through, apparently without resistance. When the Guard reached the crest of Blanket Hill by the southeast corner of Taylor Hall at about 12:25 p.m., they faced the students following them and fired their weapons. Four students were killed and nine were wounded."
>
> . . .
>
> "Six Guardsmen, including two sergeants and Captain Srp of Troop G stated pointedly that the lives of the members of the Guard were not in danger and that it was not a shooting situation."
>
> . . .
>
> "We have some reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event. The apparent volunteering by some Guardsmen of the fact that their lives were not in danger gives rise to some suspicions."
>
> . . .
>
> "[One guardsman] admitted that his life was not in danger and that he fired indiscriminately into the crowd. He further stated that the Guardsmen had gotten together after the shooting and decided to fabricate the story that they were in danger of serious bodily harm or death from the students."
>
> . . .

"Also, a chaplain of Troop G spoke with many members of the National Guard and stated that they were unable to explain to him why they fired their weapons."

. . .

"No verbal warning was given to the students immediately prior to the time the Guardsmen fired."

. . .

"There was no request by any Guardsmen that tear gas be used."

. . .

"There was no request from any Guardsman for permission to fire his weapon."

. . .

"The Guardsmen were not surrounded."

. . .

"No Guardsman claims he was hit with rocks immediately prior to the firing."

. . .

"There was no sniper."

. . .

"The FBI conducted an extensive search and has found nothing to indicate that any person other than a Guardsman fired a weapon."

. . .

"At the time of the shooting, the National Guard clearly did not believe that they were being fired upon."

. . .

"Each person who admits firing into the crowd has some degree of experience in riot control. None are novices."

. . .

"A minimum of 54 shots were fired by a minimum of 29 of the 78 members of the National Guard at Taylor Hall in the space of approximately 11 seconds."

. . .

"Five persons interviewed in Troop G, the group of Guardsmen closest to Taylor Hall, admit firing a total of eight shots into the crowd or at a specific student."

. . .

"Some Guardsmen (unknown as yet) had to be physically restrained from continuing to fire their weapons."

. . .

"Four students were killed, nine others were wounded, three seriously. Of the students who were killed, Jeff Miller's body was found 85-90 yards from the Guard. Allison Krause fell about 110 yards away. William Schroeder and Sandy Scheuer were approximately 130 yards away from the Guard when they were shot."

. . .

"Although both Miller and Krause had probably been in the front ranks of the demonstrators initially, neither was in a position to pose even a remote danger to the National Guard at the time of the firing. Sandy Scheuer, as best as we can determine, was on her way to a speech therapy class. We do not know whether Schroeder participated in any way in the confrontation that day."

. . .

No person shot was closer than 20 yards from the guardsmen. One injured person was 37 yards away; another, 75 yards; another, 95 or 100 yards; another, 110 yards; another, 125 or 130 yards; another, 160 yards; and the other, 245 or 250 yards.

. . .

"Seven students were shot from the side and four were shot from the rear."

. . .

"Of the 13 Kent State students shot, none, so far as we know, were associated with either the disruption in Kent on Friday night, May 1, 1970, or the burning of the ROTC building on Saturday, May 2, 1970."

. . .

"As far as we have been able to determine, Schroeder, Scheuer, Cleary, MacKenzie, Russell and Wrentmore were merely spectators to the confrontation."

. . .

"Aside entirely from any questions of specific intent on the part of the Guardsmen or a predisposition to use their weapons, we do not know what started the shooting."

Notwithstanding these conclusions of the Justice Department lawyers who reviewed the FBI investigation, John N. Mitchell, who at the time was Attorney General (although also involved

in the President's re-election campaign), refused to permit a federal grand jury investigation of the Kent State shootings to determine whether charges under 18 U.S.C. §241 or §242 should be brought. However, on May 10, 1973, and subsequently to at least two representatives of the press who made the information public, Deputy Assistant Attorney General K. William O'Connor, who was head of the Criminal Section of the Civil Rights Division at the time when the Justice Department Summary was prepared, acknowledged that the evidence in the Department's hands is (and was then) ample to support the indictment of several guardsmen involved in the shooting for violation of 18 U.S.C. §242.

At a press conference on June 15, 1973, Assistant Attorney General J. Stanley Pottinger, who became head of the Civil Rights Division in February, 1973, acknowledged that he had personally undertaken a full-scale review of the Justice Department files on the Kent State matter. On August 3, 1973, Pottinger announced at another press conference that on his recommendation Attorney General Elliot L. Richardson had authorized a formal reopening of the Kent State case, and that a federal grand jury investigation of the shootings may be undertaken. In addition, the staff of a subcommittee of the House Judiciary Committee chaired by Representative Edwards of California is conducting an investigation, looking toward forthcoming subcommittee hearings into the actions of former Ohio governor (and defendant) Rhodes and others in connection with the events giving rise to this litigation.

These are all facts of common public knowledge which are subject to judicial notice. It is against the background of these facts, not to mention the allegations of the unanswered complaints, that the decisions of the courts below must be judged. And in this light Judge Weick's postulation of "insurrection" and "riot," and Judge O'Sullivan's charges of "dissembling" and contrivance "to hide rather than disclose the true background of the involved events," stand out as utterly shocking premises for the decision of the Court of Appeals.

II. LEGAL CONTEXT OF THE ISSUES

The complaints in these cases, in obedience to *Fed. R. Civ. P.* 8(a) (2), confine themselves to a "short and plain statement of the claim." They do not detail all that has been recited heretofore in this brief. But in conformity with *Fed. R. Civ. P.* 8 (f), "so construed as to do substantial justice" they aptly allege facts supporting causes of action entitling the plaintiffs to judicial relief. In order for the significance of the lower courts' immunity holdings to be appreciated, it is necessary to consider the character of the causes of action stated, which would merit relief but for the immunity bar.

The allegations of the complaints with regard to defendant Rhodes are that as governor of Ohio he caused armed state military troops to be placed on the Kent State University campus without sufficient cause, authorized them to disperse lawful assemblies, permitted them to carry guns loaded with live ammunition, and failed to keep them under proper control. Facts supporting these allegations, found by the President's Commission or the Justice Department or both (and therefore susceptible of judicial notice for purposes of this present review) and provable by the plaintiffs if they are ever permitted a trial, include Rhodes' verbal authorization of the commitment of guardsmen to the City of Kent late in the afternoon of May 2, without formal finding or proclamation of need and without any request from University officials, and while civilian institutions were functioning; his delegation of power, without effective civilian supervision, to "the discretion of the commanding military officer designated by the Adjutant General;" his failure to clarify lines of responsibility and command during his presence in Kent on May 3; his inflammatory public comments at that time; and his failure to order strict military troop subordination to the local civilian officials at the scene.

The allegations with regard to defendants Del Corso and Canterbury are that as Adjutant General and Assistant Adjutant General and the chief military officers on the scene they ordered their troops onto the campus without sufficient cause, with indifference and disregard for the lives of students; authorized

them to disperse lawful assemblies; authorized them to use loaded weapons; and failed to keep them under control so as to prevent them from shooting the decedents. Among the facts supporting these allegations, judicially noticeable for purposes of reviewing these dismissals and provable if plaintiffs are permitted a trial, are these defendants' deployment of troops on the campus without request, authorization, or supervision by any University official, while civilian institutions were functioning and University operations were unimpaired; their orders to "lock and load" weapons; Canterbury's order to disperse the May 4 assembly at a time when it had not become and was not threatening to become either disorderly or unlawful, and at a time and in a manner posing unreasonable dangers to innocents and bystanders; and their failure either to prevent or to immediately stop the "unnecessary, unwarranted, and inexcusable" sustained fusilade directed against distant persons by troops under their direct and immediate command.

The allegation against defendant White is that as President of the University he omitted to act when his actions could have decreased the risk of shootings such as that which occurred. Among the supporting facts are that White failed to assert his legitimate authority over military troops on the campus, abdicated his responsibility, acquiesced in the arrogation of authority by defendants Del Corso and Canterbury, and countenanced the deprivations of constitutional rights which it was his responsibility and duty to prevent.

If these allegations with regard to defendants Rhodes, Del Corso, Canterbury, and White are proved, they will make out claims for violation of some of the most fundamental, essential, and frequently reiterated safeguards of constitutional liberty and domestic security. First, the constitutional rights of peacable assembly and petition are fundamental, and cannot be infringed at the whim even of civilian, let alone military, convenience. "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expedience dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government." *Reid v. Covert,*

354 U.S. 1, 14 (1956). "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). In these cases, these defendants' acts as alleged in the complaints caused the intentional infringement of constitutional rights of assembly and petition, and also, in consequence, of the decedents' rights to life.

Second, the right to civilian government—to the primacy of civilian law and officials and the complete subordination of military personnel and power—is a right that is constitutionally secured and protected. The rule of due process in the historic tradition of English, and even more emphatically, of American law dictates that so long as civilian institutions are capable of functioning military personnel may be utilized to deal with civilians only as an essentially *civilian* supplemental force, completely under the control and direction of local civilian officials, subject to the rules and restraints of civilian law, and neither bound nor protected by the rules of military law. Specifically, due process forbids the displacement of regular civilian officials' judgment and discretion by the supervening power of a military commander, even as to the "procedure of execution" of designated objectives. Ohio's own jurisprudence recognizes this principle. *State of Ohio v. Coit*, 8 Ohio Dec. 62 (C.P. 1897). It has been reaffirmed time and time again by this Court and by other courts. E.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Sterling v. Constantin*, 287 U.S. 378, 392, 403-04 (1932); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866); *Faubus v. United States*, 254 F.2d 797, 806-07 (8th Cir. 1958); *Constantin v. Smith*, 57 F.2d 227, 236, 238-39 (E.D. Tex. 1932); *United States ex rel. Palmer v. Adams*, 26 F.2d 141, 144-45 (D. Colo. 1928); *United States v. Phillips*, 33 F. Supp. 261, 269 (N.D. Okla.), vacated because of erroneous use of three-judge court, 312 U.S. 246 (single judge thereafter entered identical decree); *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 223-24, 19 P.2d 582, 588-89 (1933); *Hearon v. Calus*, 178 S.C. 381, 410, 183 S.E. 13, 25 (1935); *see also Wilson & Co. v. Freeman*, 179 F. Supp. 520, 527 (D. Minn. 1959). Comprehensive historical research and legal analysis has reinforced the judicially reiterated rule. *E.g.*, Note,

Constitutional Law–Martial Law, 75 W. Va. L. Rev. 143 (1973); Note, *Martial Law and the National Guard*, 18 N.Y. L. F. 216 (1972); The Law Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders*, 43 Colo. L. Rev. 399 (1972); Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1 (1971); Comment, *Constitutional Law–The Power of a Governor to Proclaim Martial Law and Use State Military Forces to Suppress Campus Demonstrations*, 59 Ky. L. J. 547 (1970); Comment, *Martial Law*, 42 So. Cal. L. Rev. 546 (1969); Mutter, *Some Observations on Military Involvement in Domestic Disorders*, 29 Fed. B. J. 59 (1969). For a succinct discussion see *Brief of The Law Revision Center as Amicus Curiae* in *Gilligan v. Morgan*, ____ U.S. ____ (No. 71-1553, decided June 21, 1973).

The contrary practice flourished for a time earlier in the century, under the impression that a governor's discretion in superseding civilian rule with military power was not subject to review. That practice of utilizing troops in derogation of civilian law and ordinary civilian officials, according to Frederick Bernays Wiener, "rested on an unfortunate Supreme Court dictum in *Moyer v. Peabody*," 213 U.S. 78 (1909). Wiener, *Martial Law Today*, 55 A.B.A.J. 723, 724 (1969). The dictum, by Justice Holmes for the Court, was that "the Governor's declaration that a state of insurrection existed is conclusive of that fact." 213 U.S. at 83. Holmes himself later acknowledged, in a different context, the impermissibility of letting a branch of government decide conclusively for itself when the circumstances prerequisite to extraordinary powers are present. *Chastleton v. Sinclair*, 264 U.S. 543, 547 (1924). But with regard to the habit of governors and National Guard commanders to supersede civilian law and officials on pretext of emergency, as Frederick Bernays Wiener noted, "It took the decision in *Sterling v. Constantin*, [287 U.S. 378] handed down in 1932, to put an end to such outrages," Wiener, *supra*, 55 A.B.A.J. at 724.

Regrettably, in the forty years since *Sterling* the lessons of history and the precepts of due process have faded from recollection again. In the period since January 1, 1968, military troops have been utilized in domestic situations more

frequently than during any comparable period in American history; and as the facts giving rise to this present litigation illustrate, they are commonly used in violation of the rules of civilian due process heretofore enforced by this Court. Legislators at the present time have under active consideration proposals to more effectively implement the constitutional standards for employment of military troops in domestic emergencies. *See, e.g.*, 119 *Cong. Rec.* H3615 (Daily ed., May 10, 1973) (remarks of Congressman Seiberling of Ohio). Reaffirmation of these historic principles by this Court at this time would be of substantial aid to the Congress. Proof of the urgent need for such reaffirmation is presented by the opinion of the Court of Appeals in the cases now under review, relying explicitly upon the "unfortunate Supreme Court dictum" in Moyer v. Peabody to hold that a state chief executive's actions with respect to the use of military troops in times of purported emergency must not be subjected to judicial review.

The allegations of the complaints against the named and unnamed officers and members of the Ohio National Guard allegedly involved in the shootings at Kent State are that they each, or persons under their direct command, acting under color of state law, without legal justification or pursuant to patently unlawful orders intentionally, willfully, wantonly, recklessly, and maliciously fired live ammunition at decedents and other persons, in disregard of the lives and safety of decedents and the others. Among the supporting facts are the behavior of Cavalry Troop G on the football practice field, huddling and then kneeling to aim rifles at persons on the other side of the fence as one guardsman, apparently an officer, fired a pistol shot, perhaps as a signal; that Troop's disarray on ascending the hill; the unison of the about-face at the crest of the hill; the retracing of steps before firing; the distance of the victims from the firing guardsmen; the lack of any threat from the students to the guardsmen at or immediately before the firing; the sustained nature and long duration of the fusilade; the need for physical restraint to make some guardsmen cease firing; and the apparent contrivance of false excuses and justifications afterwards. Facts such as these, in the knowledge of the Department of Justice, have persuaded Deputy Assistant Attorney General O'Connor that several of

the guardsmen are indictable under 18 U.S.C. § 242, as stated earlier in this brief. It is inconceivable that such facts, if proved, would make out no civil cause of action. In addition to a cause of action for wrongful death under state law, where the facts show such summary deprivation of life or imposition of grave bodily injury arbitrarily by officers of and on behalf of the state those facts make out a cause of action under the federal Civil Rights laws.

The allegations of these complaints against defendants Rhodes, Del Corso, Canterbury, White, and the named and unnamed officers and members of the Ohio National Guard thus clearly state causes of action under 42 U.S.C. § 1983, in addition to, in the cases of plaintiffs Krause and Miller, state law causes of action determinable in federal court on diversity grounds. It is these manifest causes of action that the lower courts in these cases have barred, by erecting barriers of immunity to dismiss the complaints before answer and without allowing the plaintiffs any chance to prove their allegations at trial.

III. THE ISSUES FRAMED BY THE CERTIORARI PETITION

A. Factual Assumptions Contrary to the Unanswered Complaints

Seldom if ever has any case demonstrated so poignantly the importance of the principle that for purposes of a motion to dismiss under *Fed. R. Civ. P.* 12 (b) (1), just as under 12 (b) (6), the uncontroverted allegations of a complaint must be taken as true. 5 Wright & Miller, *Federal Practice & Procedure* § 1350, at pp. 551-52; § 1357, at pp. 594-96. The insistence by the District Court and by the majority of the Court of Appeals in these cases upon their own preconceived view of the untried facts, to the point of accusing the plaintiffs' counsel of deliberate deception, indelibly marks the decisions below as sheer feats of will.

B. The Eleventh Amendment

Both the District Court and the Court of Appeals in these cases held that the plaintiffs' complaints could not be entertained because of the eleventh amendment.

It is true that under the doctrine of *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), it is sometimes possible to view a suit which names only government officials personally as defendants, as being "in substance" a suit against the state itself for eleventh amendment purposes. For a detailed analysis of the complicated and confused intellectual process by which the doctrine announced in *Larson* evolved, see Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 22-8, 32-41 (1972). However, the *Larson* doctrine is subject to at least one uniformly recognized exception: that a suit naming only government officials personally as defendants *cannot* be viewed as "in substance" a suit against the state itself when the acts alleged as giving rise to the cause of action are acts which are prohibited by the Constitution or which violate constitutional rights. This exception was explicitly recognized in *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963). Although the majority below purported to rely upon *Dugan*, they apparently ignored *Dugan's* recognition of this exception to the *Larson* rule. As detailed in Part II of this brief, the complaints in these present cases explicitly and unequivocally allege facts showing violations of fundamental constitutional rights under color of state law.

The majority below made much of the supposed interference with the functions of state officers that would purportedly result from judicial entertainment of these complaints. But the Supreme Court answered that fear long ago, explaining that the "fancied inconvenience" of interference which might result from allowing suits of officers for their unconstitutional acts is seen to "vanish . . . at once upon the suggestion that such interference is not possible, except when the government seeks to [act] . . . contrary to law . . . and in violation of the Constitution of the United States." *Poindexter v. Greenhow*, 114 U.S. 270 (1885).

Indeed, precisely the proposition now espoused by the Court of Appeals—that suits against officers personally for their unconstitutional acts can be barred by the eleventh amendment—was urged upon and categorically repudiated by the Supreme Court in the *Poindexter* case, *supra*. This Court at that time denounced this very proposition as "the doctrine of absolutism, pure, simple, and naked; and of communism . . .;" and this Court declared that "[t]he doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it." 114 U.S. at 291. If that proposition were sound, constitutional rights would be largely unenforceable, and the pretense of constitutional restraints upon government would become a farce.

The contrary rule, which holds the eleventh amendment inapplicable to suits against officers for unconstitutional acts, is illustrated by *Ex parte Young*, 209 U.S. 123 (1902). The majority below dismissed *Young* as "inapposite" because *Young* was an action for injunction, whereas the present complaints seek damages. But it is equitable relief, not relief in damages, which is extraordinary. The present cases are *a fortiori* to *Young*. Indeed, it has always been taken for granted that the reason why equitable relief against an officer's unconstitutional action is available is simply that the remedy at law in damages, *available as a matter of course*, might be inadequate. *See, e.g., Sterling v. Constantin*, 287 U.S. 378 (1932). Relief in damages against officers personally for their unlawful or unconstitutional actions had been regularly awarded for more than a century before *Young* was decided. *See*, Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 14-21 (1972), and cases there cited. Suits for unlawful or unconstitutional acts against federal government officials personally were already familiar and traditional when the Reconstruction Congress provided a comparable federal remedy for constitutional violations by state government officials by enacting what is now 42 U.S.C. §1983. Although the traditional practice for enforcing constitutional rights may for a time have been lost sight of, the essential principle underlying it was very recently reasserted by this Court in *Bivens v. Unknown Named Agents*, 403 U.S. 388 (1971), recognizing a cause of action for damages against federal officials personally for

violation of constitutional rights. In the present case, involving state officials, the enactment by Congress of 42 U.S.C. § 1983 makes judicial creation of the remedy unnecessary; but the same considerations that compelled creation of the remedy in *Bivens* preclude the efforts that have been made by the lower courts here to emasculate § 1983.

Liability under 42 U.S.C. § 1983 "is entirely personal in nature intended to be satisfied out of the individual's own pocket." *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971). By its terms § 1983 reaches only acts under color of state law, which ordinarily will be acts of state officials. The adoption by the courts below of the heretofore consistently denounced and rejected proposition that such a suit can be barred by the eleventh amendment, is tantamount to a judicial repeal of § 1983. It is no wonder that no precedent can be found to support their decision.

Justice would be better served with respect to all parties if instead of continuing the tradition of enforcing limitations upon the government by suits against individual officers, this Court were to hold that the fourteenth and some other amendments modify the earlier eleventh amendment, so as to make possible direct suits for redress against the state itself, leaving the state to deal as it chooses with its own faithless servants. By that rationale or any of several others, supported by ample reason and precedent, the harshness which sometimes characterizes the traditional remedy could be avoided without eliminating the right of redress for constitutional wrongs. *See* the discussion in support of such an approach in Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 60-77 (1972). To date, however, this Court has not chosen to follow that course. So long as redress against the state itself is not allowed, the right to recover from officers personally on proof of allegations like those in the complaints in these cases cannot be frustrated by interposition of the eleventh amendment, without candidly abandoning the pretense that ours is a system of government limited by law.

C. Personal Privilege or Immunity of Executive Officials

Unlike the District Court, the Court of Appeals in these cases was not content to base the dismissals upon untenable eleventh amendment grounds, but added as an alternative rationale an unprecedented rule of categorical and unqualified personal privilege or personal immunity for executive officials. In the words of Judge Weick's opinion for the majority, "since the courts have granted to themselves absolute immunity, it would seem incongruous for them not to extend the same privilege to the Executive."

This is not a question of first impression. This Court has fully considered the matter, and has found that applying different rules of personal privilege to executive officials than to judicial or even legislative officials is not "incongruous" at all. The difference between judicial immunity and the far more limited privilege allowable to executive officials under 42 U.S.C. § 1983 was confirmed by this Court in *Pierson v. Ray*, 386 U.S. 547 (1967). The absolute privilege or immunity enjoyed by judicial (and also by legislative) officials is supported by sound public policy, centuries of legal history, and even some constitutional language. *See* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 42-7 (1972). But an absolute privilege or immunity for executive officials is supported by none of these.

The most generous rule of personal privilege or immunity for executive officials that has ever been approved by this Court for application under 42 U.S.C. § 1983 is that approved in *Pierson v. Ray*, 386 U.S. 547 (1967), allowing executive officials a defense of good faith and probable cause. There can be no doubt that the allegations of the unanswered complaints in these cases, taken as true for purposes of *Fed. R. Civ. P.* 12 (b), negate both good faith and probable cause.

In point of historical fact, the traditional rule in American law was that executive officials were personally liable for unconstitutional acts *even notwithstanding* good faith, probable cause, noble intentions, or obedience to orders. Numerous

cases and authorities illustrating this traditional rule and explaining why it has adhered to so rigorously are cited and discussed in Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 14-20, 47-51 (1972). Post-Civil War federal statutes purporting to immunize executive officials were held unconstitutional under the federal Constitution by lower courts. *E.g., Griffin v. Wilcox*, 21 Ind. 370, 372-373 (1863); *Milligan v. Hovey*, 17 F. Cas. 380, 381 (No. 9605) (C.C.D. Ind. 1871). While the Supreme Court never had occasion to pass squarely upon the validity of these statutes, there are strong indications that if it had the Court would have agreed that insofar as they purported to confer immunity for unconstitutional acts those statutes were void. *See, e.g., Poindexter v. Greenhow*, 114 U.S. 270 (1885); *Mitchell v. Clark*, 110 U.S. 633, 648-49 (1884) (opinion of Field, J, speaking to a point not reached by majority); *United States v. Lee*, 106 U.S. 196 (1882). It was not until the twentieth century that a few courts, and then some commentators, failing to review the American precedents with the care that was required, began to resort to the pre-Revolutionary "common-law" rule of executive official privilege and consider it applicable even to positive torts. The etiology of that error is examined in Engdahl, *supra*, 44 Colo. L. Rev. at 51-4.

A generous rule of privilege was countenanced, at least for a time, by the Second Circuit Court of Appeals, with respect to actions against federal officials as distinguished from actions under 42 U.S.C. § 1983. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). More recently, however, the same Second Circuit Court of Appeals itself apparently recognized the unwisdom of the *Gregoire* rule, and applied instead the much less generous privilege rule of good faith and probable cause that had been approved by this Court in *Pierson v. Ray, supra. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

Some language from *Gregoire* was quoted in dicta by Mr. Justice Harlan in *Barr v. Matteo*, 360 U.S. 564, 571-72 (1959); but *Barr* involved a federal rather than a state official, did not arise under a specific statute like § 1983 specially

authorizing the relief that was sought, and most important, did not involve any alleged infringement of constitutional rights. Justice Harlan himself was acutely aware that no such generous privilege can be extended to executive officials where violations of constitutional rights are concerned: Harlan joined in the Court's opinion in *Pierson v. Ray, supra,* allowing executive officials only the defense of good faith and probable cause where constitutional rights were infringed; and Harlan's concurring opinion in *Bivens v. Unknown Named Agents,* 403 U.S. 388, 398 et seq. (1971), while not addressing the personal privilege point, is an eloquent statement of the importance of affording redress in damages for constitutional wrongs.

Consequently the decision below, contriving a wholly novel rule of absolute personal executive immunity, constitutes a departure from American constitutional tradition that is of radical proportions indeed.

The Court of Appeals endeavored to reinforce its unprecedented ruling, at least insofar as it dealt with the governor, defendant Rhodes, by referring to *Moyer v. Peabody,* 212 U.S. 178 (1909). Earlier in this brief it was pointed out that the language in *Moyer* relied upon below has been characterized by the most noted contemporary American authority on military law as "an unfortunate Supreme Court dictum," which regrettably gave colorable justification to many instances of "phony" martial law earlier in this century until this Court's decision in *Sterling v. Constantin,* 287 U.S. 378 (1932) at last "put an end to such outrages." Frederick Bernays Wiener, *Martial Law Today,* 55 A.B.A.J. 723, 724 (1969). Because of the treatment given them below, however, the language of *Peabody* and the later holding in *Sterling v. Constantin* must be more closely examined here.

The dictum in *Moyer* suggested that a governor's finding of the circumstances justifying supersession of ordinary civilian officials and procedures ("insurrection") was conclusive and could not be questioned in court. 213 U.S. at 83. Following this suggestion, the Court of Appeals in these present cases held, "nor should we make [state chief executives'] actions in this respect in times of emergency, subject to judicial

review." But the *Moyer* dictum was wrong and this Court has refused to follow it; in *Sterling v. Constantin, supra,* notwithstanding the dictum in *Moyer,* this Court reviewed the facts which a governor had found to justify supersession of ordinary civilian officials and procedures, held that they did not, and found the governor's military acts in derogation of civilian laws and officials to be unlawful.

In *Moyer* the Court had also suggested that military troops could lawfully imprison or even shoot citizens "without sufficient reason." 212 U.S. at 84. But in *Sterling v. Constantin,* the Court took a closer look at the facts that had been alleged in *Moyer,* and found (like the Circuit Court in *Moyer* had found, see *Moyer v. Peabody,* 148 Fed. 870 (C.C.D. Colo. 1906)) that because of its "direct relation" to the solution of the problem the arrest and detention of Mr. Moyer had been reasonable; and with the facts of *Moyer* so reinterpreted the *Sterling* Court cautioned that "the general language of the [*Moyer*] opinion must be taken in connection with the point actually decided." 287 U.S. at 400. As thus reinterpreted in *Sterling,* whatever privilege *Moyer* might afford is limited to acts which are judicially found in retrospect to have been directly related to a lawful mission; and even this privilege pertains to the employment of troops in what the *Moyer* Court had postulated as an actual "insurrection," not to mere civil disorder, and certainly not to the dispersal of a peaceful assembly.

Under *Sterling,* it is recognized that the determination whether exigencies require the use of military *aid* for the purpose of *faithfully executing* the *civilian laws* is a determination to be made conclusively by the governor. 287 U.S. at 399. It is also recognized that there is "a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order . . . ." 287 U.S. at 399-400. This latitude, in effect, allows a defense of good faith and probable cause. 287 U.S. at 400. But as the Court held in *Sterling*, this does not mean that a governor or anyone who acts under him can supersede civilian law and authorities with military officers and force, and escape judicial scrutiny by his own self-serving declaration of necessity. "What are the

allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." 287 U.S. at 401. "When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." 287 U.S. at 398.

Sterling cannot be distinguished from these present cases on the ground that in *Sterling* the governor had *eo nomine* declared "martial law." If that were a point of distinction at all, it would strengthen these plaintiffs' case; for here the displacement of ordinary civilian authority and the disregard of ordinary law and constitutional rights occurred in the absence of any formal proclamation that civilian law was disabled. Thus if anything the present cases are *a fortiori* to *Sterling*. Actually, however, the presence or absence of any sort of declaration is not really a point of distinction. The displacement of civilian by military authority, as distinguished from the enlistment of aid from military units under strict obedience to local civil officers and law, is the *de facto* imposition of martial law, and is forbidden by the rule of due process. *See* Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 70 n. 324 (1971). And *Sterling* held that such a constitutional violation is necessarily a matter for judicial inquiry "in an appropriate proceeding directed against the individuals charged with the transgression." 287 U.S. at 398.

42 U.S.C. § 1983 affords the appropriate proceeding and remedy. These plaintiffs only ask their rightful opportunity to prove the transgression.

D. The Diversity Claims in Krause and Miller

As Judge Celebrezze in part V of his dissenting opinion in the Court of Appeals pointed out, two of the three cases now before this Court—*Krause* and *Miller*—state causes of action under state law which were brought within the District Court's jurisdiction on diversity grounds. The District Court and the

majority in the Court of Appeals completely disregarded these diversity claims. The only thing to be added to Judge Celebrezze's excellent discussion of this aspect of these cases is that Ohio, by statute, specifically countenances damage actions against National Guardsmen for acts done on active duty in civil disorder situations which constitute "willful or wanton misconduct." *Ohio Revised Code* §5823.37 (Supp.). The allegations in the *Krause* and *Miller* complaints incontrovertibly allege acts of "willful or wanton misconduct."

E. The United States Not a Necessary Party

In what seems scarcely more than makeweight, the majority below held that the United States was a necessary party to these cases because a decision could implicate the training and weaponry of the National Guard, for which the United States bears some responsibility.

The complaints do allege that the defendant guardsmen were inadequately trained and improperly permitted to use loaded weapons. That, however, was not accountable to the United States. This Court has already found, in *Gilligan v. Morgan*, ____ U.S. ____, 93 S. Ct. 2440 (1973), that at the time of the events giving rise to these complaints Ohio's training and weaponry practices for civil disorders were out of compliance with United States policy for the National Guard. Neither the affirmative unlawful acts nor the negligent or reckless acts charged against the various defendants in these cases in any way implicate the United States, nor will the interests of the United States be affected by adjudication of these cases. This ground of the decision below is patently spurious.

CONCLUSION

Restraint in the face of alleged facts so egregious as those presented in these complaints and judicial conduct such as that indulged in by the courts below, is exceedingly difficult. But perhaps this is an instance when eloquent declamations would detract from the force of the naked facts themselves.

This Court's current docket contains cases presenting in several different contexts historic questions concerning the amenability of the executive branch of government to the restraints of constitutional and ordinary law. These present cases are among them. These cases, however, while historic, are not unprecedented. The principles for their resolution are thoroughly settled by prior decisions. And Anglo-American history also records the grave misfortunes that are risked when those well-settled principles are disregarded.

All that these plaintiffs ask is the opportunity to prove the allegations of their complaints. The deepest traditions of our law demand that they have that opportunity. The question is simply whether this Court will allow it.

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